

Doug Muir

01/12/2001 11:03 AM

To: Daniel Jiron/R4/USDAFS@FSNOTES, Larry
Gillham/R4/USDAFS@FSNOTES

cc:

Subject:

RE: Cardiff Fork Access

Under the Common Law of Dominant Tenant, the United States must grant reasonable access to this particular and other private parcels within the National Forest that are totally surrounded by National Forest System Lands. There are several other laws which also provide for access to private inholdings within the National Forest. The point being, that reasonable access must be granted. In some cases we do this through a special use permit. However, because a special use permit conveys no interest in an easement, and this has a consequent effect on value, if the private land owner wants a more permanent type of easement we must grant it. However, we don't grant these until the owner requests something more than a special use permit.

Perhaps the biggest issue is what is "reasonable access". In general this means right of access using normal means of transportation for the land owner and his/her guests. It also requires the shortest distance, unless it can clearly be demonstrated that this route would present significant long term and continuing damage to the surrounding property. This damage may be physical or economic. In this case another route would need to be selected which would avoid the damage, and yet would be the shortest, feasible route.

Who else has jurisdiction of access to private lands? The County and/or City having jurisdiction over an area may impose additional restrictions on access through their local zoning ordinances and regulations. However, it is up to the county to enforce those ordinances and regulations.

Can the United States limit access to private property inholdings as a preventive measure? In general, we can not unless we have the private landowners permission. Installing gates, or other facilities to block or limit access, can only be done with the concurrence of the affected landowner. However, if the landowner or his/her guests cause damage to surrounding NF lands as a result of their use of the access, they are liable for the costs to repair that damage, as well as any criminal penalties that may be imposed based on Federal law and regulations. We can also take action to require a landowner to repair, maintain, or reconstruct a road that is resulting in damage to public land.

I hope this information helps. It appears that when a historical access is used for access to a private land inholding, we have to demonstrate a harm to the surrounding public lands before we can take action. The action is then to remedy the harm. To try to restrict access by arbitrarily placing limitations on who can or cannot use an access road could be considered a "taking action", one which reduces land value, and pose a whole suite of problems for us. So, it just seems better to use the county zoning ordinances designed to protect watershed to help achieve what we need.

Doug

FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

NOV 08 2007

BY D. MARK JONES, CLERK
DEPUTY CLERK

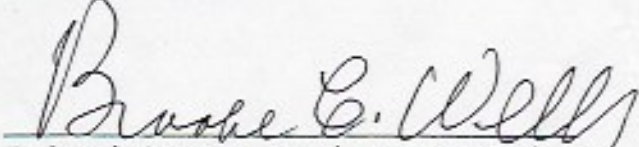
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, : ORDER GRANTING LEAVE TO DISMISS
Plaintiff, : VIOLATION NOTICES F3783943,
 : F3783844 and F3783945
 :
v. : Unauthorized use of Forest
 : System Land (36 C.F.R.
 : 261.10(k), Using a Vehicle
 : Prohibited by an Order(36
 : C.F.R. 261.54(a) and Using a
 : Vehicle Prohibited by an
 : Order(36 C.F.R. 261.54(a))
 :
 : Magistrate Judge Brooke C.
 : Wells

Based upon the Motion of the United States of America, and for good cause appearing, the Court hereby grants the government leave to dismiss the above-captioned Violation Notice, with prejudice, under Rule 48(a) of the Federal Rules of Criminal Procedure.

DATED this 8 day of Nov., 2007.

BY THE COURT:


United States Magistrate Judge

MEDIATION STATEMENT OF CARDIFF CANYON OWNERS ASSOCIATION:

MEDIATION: JANUARY 12, 2023, 1:00PM

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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SALT LAKE CITY, UTAH 84111

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INTRODUCTION

For purposes of this mediation brief the parties will be referred herein according to the following categories:

BACKGROUND INFORMATION ON PROPERTY IN QUESTION

According to Wasatch Backcountry Skiing Guide, "Upper Cardiff Fork provides some of the most spectacular skiing in the Wasatch mountain range" and it is a..." world-renowned playground." <https://wbsguide.com/2645.php>. The Outbound claims that "Cardiff Fork is a great Wasatch backcountry tour" and "Cardiff offers a wide variety of wide-open bowls and awesome chutes." <https://www.theoutbound.com/utah/skiing/backcountry-ski-cardiff-fork>. And Utah Outside says, "There are many reasons for Cardiff Pass to be filled with tens of dozens of ski-touring parties on any given morning – the ascent begins right off the highway in Alta, just a mile-long tour will get you into spectacular backcountry terrain, and the access to epic descents on Mount Superior, Cardiff Fork, and Cardiac Ridge is unparalleled."

<http://www.utahoutside.com/2012/04/backcountry-skiing-cardiff-pass/>. Although much of this "world renowned playground" is owned by the US Forest Service, *nearly half of the prized Cardiff canyon is privately owned*. In fact, there are over 1,400 acres of private property in Cardiff, which is nearly 300 acres more than Brighton Ski Resort. Not only do outdoor recreators enjoy Cardiff's close proximity to some of the nations premier commercial ski resorts, with some backcountry skiers paying thousands of dollars per day to private, commercial tour guides, but Cardiff is also located in the heart of Salt Lake City's watershed. According to Salt Lake City, "...these beautiful and majestic mountains...produce naturally pure water and provide more

than half of the drinking water that 360,000 people depend on every day." <https://www.slc.gov/utilities/watershed/watershedmanagementplan/>. Due to Cardiff canyons recreational demands and watershed value, it seems reasonable to assume that Salt Lake City would prioritize the purchase of lands in Cardiff canyon. Armed with its State granted Extra Territorial Jurisdiction and millions of dollars in its "Public Utilities Watershed and Water Rights Purchase Fund", Salt Lake City's purchase of much of Cardiff Canyon would ensure watershed over-sight while eliminating conflict between the users of public lands and private landowners. However, when Salt Lake City was offered hundreds of acres in upper and lower Cardiff, they declined to buy. When Salt Lake City was offered nearly 100 acres near Donut Falls, ensuring strategic public access, the City declined. When land experts, following the recommendations found in the "Wasatch Canyons Tomorrow", successfully secured private property near Solitude Ski Resort, the press and special interest groups attacked. False accusations were made including, "...these landholders or claim holders would have had a massive pay-day. But luckily there are some good people in Salt Lake County preventing this sort of development." Although this land trade matched the scenario the Governor, elected officials, environmental groups, pushback from the backcountry community, was enough to abort the proposed Cardiff/Dunyon land trades. The trades would have retired into public ownership nearly 1,000 acres of treasured Cardiff property. <https://envisionutah.org/projects-archive>. When the land conservation effort "Save A Spot" identified a key parcel in Cardiff canyon, they offered it to the backcountry groups so they would have standing in Cardiff canyon. Backcountry individuals and groups were discouraged, a great opportunity was missed, and the private property was secured by members of the Cardiff Canyon Owners Association ("CCOA").

Special Use Permit

Due to the fact that the US Forest Service is unable to demonstrate that they own the road and that the landowners are due reasonable access, there is no need for a Special Use Permit. In 2012, the CCOA entered into a "Special Use Permit" with the US Forest Service. The "reciprocal" permit allowed the Forest Service to cross private lands on the designated road. In return, members of the CCOA were granted vehicular access on the subject road across Forest Service land. Fees were waived by both parties. Backcountry users were allowed foot and ski access across coveted private lands on the designated road and existing trails. The Special Use agreement was made known to the public in May of 2012.

<https://archive.sltrib.com/article.php?id=20902061&itype=storyID>. In 2014, a headline in the Salt Lake Tribune proclaimed "Cardiff Fork Compromise Seems to be Working". <https://archive.sltrib.com/article.php?id=58149928&itype=CMSID> Unfortunately, over the past several years, it seems the tone by the US Forest Service has shifted from one of good faith and collaboration to a negative attitude and accusations. Due to the shifting nature of the Forest Service, the CCOA decided to not renew its Special Use Permit. The Forest Service changed the locks at the Cardiff gate, installed security cameras, and have prevented private landowners in Cardiff canyon from accessing their property by "normal means of transportation". Salt Lake County Councilmember Dea Theodore asked the State of Utah Private Property Rights Ombudsman to mediate. The parties agreed to attend mediation. The following information has been prepared by CCOA and distributed to vested Cardiff parties that are planning to attend the

upcoming mediation. Salt Lake City, as an owner of certain land in Cardiff is also part of the current mediation.

LEGAL ISSUES

The Cardiff Road- Private vs. Public Road

According to historical documents, the construction and maintenance of the Cardiff Fork road occurred in the 1850's and 60's. It appears Cardiff Fork road was constructed and maintained as a private road. Cardiff Fork existed several decades prior to the May 26, 1904 establishment of the Salt Lake Forest Reserve.

<https://www.presidency.ucsb.edu/documents/proclamation-529-establishment-the-salt-lake-forest-reserve-utah>. In 1905 Congress transferred responsibility for the reserves, renamed national forests, to the newly created Forest Service. https://www.uen.org/utah_history_encyclopedia/f/FORREST_SERVICE.shtml. As of yet, CCOA cannot find evidence of the US Forest Service owning or claiming ownership of Cardiff Fork road.

CCOA's position is:

- (1) This road - like all others - is private. <https://www.hcn.org/issues/47.2/this-land-is-their-land>. Salt Lake County, the US Forest Service, Salt Lake City, and the State of Utah, lack a recorded public easement or clear evidence that the subject road is public. Therefore, the subject road is private until proven or made public. The "burden of proof" is on the County, Forest Service, Salt Lake City, and or the State of Utah to determine otherwise.

- (2) The State, City, or County government has not claimed the subject road as an R.S. 2477. (August 3, 2010, Dept. of Ag/Forest Service letter). According to Save Our Canyons, "A significant victory connected with these groups was convincing Salt Lake County to give up its RS2477 highway right-of-way claims in the Wasatch..." <https://saveourcanyons.org/about/mission-and-history>

- (3) Cardiff Trail head and Parking - The County plans to encourage and collaborate with the Forest Service and UDOT to improve the trail and trail head from the Cardiff parking area to Donut Falls <https://msd.utah.gov/DocumentCenter/View/524/Salt-Lake-County-Wasatch-Canyons-General-Plan-2020>

Furthermore, Salt Lake County's hands-off approach is displayed in its most recent General Plan as shown in the statement above. CCOA cannot find any mention or efforts by the County of "collaborating" with any agencies or landowners above Donut Falls regarding the CCOA and its access in Cardiff.

Access

In 2001, Mr. Doug Muir, the lands officer for the Wasatch-Cache National Forest, sent a detailed letter to Mr. Daniel Jiron and Mr. Larry Gillham regarding "Cardiff Fork Access." *See 2021 Memo attached hereto as Exhibit 1*. Both Jiron and Gillham have extensive knowledge,

experience, and service with the US Forest Service. Mr. Jiron has been the Regional Forester for the Rocky Mountain Region of the Forest Service, served as the district ranger in the South Park District of the Pike National Forest as well as a variety of other leadership positions in three Forest Service regions and in the agency's national office in Washington, DC. Mr. Gillham was the Resource Assistant with the Salt Lake District office of the Wasatch-Cache National Forest. Mr. Muir's 2001 memo answered several important questions regarding private property surrounded by Forest Service lands. Surprisingly, more than 20 years later, current US Forest Service staff appear to raise the same questions relating to Cardiff landowners that prior Forest Service staff and documents put to rest decades ago.

Should the US Forest Service grant reasonable access to private parcels in Cardiff Canyon? Yes. Under the Common Law of Dominant Tenant, the United States must grant reasonable access to this particular and other private parcels within the National Forest that are totally surrounded by National Forest System Lands. *See* Exhibit 1. "Reasonable access" is the right of access using normal means of transportation for the landowner and his/her guests. *See* Exhibit 1.

Can the Forest Service limit access to private property inholdings as a preventive measure? No. Not without permission from the private landowners. *See* Exhibit 1.

Do the landowners have to grant reasonable access to the Forest Service? It appears not. CCOA cannot find a source that requires Cardiff landowners to grant reasonable access to the Forest Service. However, it seems that with some effort, the Forest Service can construct its own trail to its property, by-passing privately owned land. If helpful, CCOA is willing to pay for and install "detour" signs for the US Forest Service, identifying the Forest Service's new access trail around private property.

Is the Common Law of Dominant Tenant the only law we rely on for access? No. There are several other laws that also provide for access to private inholdings within the National Forest. *See* Exhibit 1.

Must "reasonable access" be granted? Yes. *See* Exhibit 1.

How is "reasonable access" granted? Sometimes through a "special use permit". *See* Exhibit 1.

Is a special use permit the only option to grant access? No. Because a special use permit conveys no interest in an easement, and this has a consequent effect on the value, if the private landowner wants a more permanent type of easement, the Forest Service must grant it *See* Exhibit 1.

How is the "more permanent type of easement" initiated? The landowner must request it. *See* Exhibit 1.

CCOA is requesting "a more permanent type of easement". We are NOT requesting a reciprocal "Special Use Permit"

36 CFR 261.10

According to the July 30, 2010 Notice of Termination by Forest Supervisor Brian Ferebee, it was stated:

Illegally occupying and operating on National Forest System land is in violation of 36 CFR 261.10(k) and (n), respectively which state the following are prohibited,

Use or occupancy of National Forest System land or facilities without special use authorization when such authorization is required, And

Failing to pay any special use fee or other charges as required.

*Any motorized use of the Cardiff Fork 14-foot right of way (Mill D South Fork) by Judd or Scott Macintosh or listed family members **must cease immediately**. Continued motorized use shall constitute a violation of 36 CFR 261.10 and subject to potential fine.*

However, when Cardiff landowners have been cited for violating 36 CFR 261.10, tickets have been dismissed "with prejudice" in the United States Federal District Court. (see Nov. 8, 2007, Magistrate Judge Brooke C. Wells). See attached **Exhibit 2**. Recently, a Cardiff landowner was cited by Forest Service Law Enforcement, yet the following day, the citing Forest Service Ranger showed up on his porch and instructed the landowner to ignore and tear up the citation. Attached hereto as **Exhibit 3**.

NEPA

NEPA is not necessary for to permit vehicular access to the Cardiff Canyon road since the permit was already reviewed and approved years ago.

Jurisdiction

Who else has jurisdiction over access to private lands in Cardiff? The County and/or City may impose additional restrictions on access through their local zoning ordinances and regulations. See Exhibit 1. The CCOA is not aware of the County and/or City's "additional restrictions on access through their local zoning ordinances and regulations." In fact, it appears that Salt Lake County ceded its ability to do so. <https://saveourcanyons.org/about/mission-and-history>

Does the Forest Service enforce local County/City zoning ordinances and regulations? No. It is up to the County/City to enforce its ordinances and regulations See Exhibit 1.

The Forest Service is in conflict with Doug Muir's 2001 memo regarding "County/City" ordinances and regulations. Forest Supervisor Dave Whittekiend's November 18, 2020 "Notice

of Non-Compliance" to CCOA President Mr. Wayne Crawford states, "The road is also being used to access multiple structures on CCOA member parcels. It is our understanding that the appropriate permits for the structures have not been obtained from the State of Utah, Salt Lake County, and Salt Lake City Department of Public Utilities."

The CCOA has been in communication with the Greater Salt Lake County Municipal Services District ("MSD") to resolve these issues and has submitted approximately 20 separate applications for Conditional Use permits in Cardiff Canyon. It is important to note that although the Forest Service, the County, the District Attorney's office, the MSD, backcountry users, and others, quickly point to certain Cardiff owner's yurt, a connex box, or tent, alleging ordinance violations by these landowners, these same entities and organizations seem to refuse to apply the same critical eye and concerns with the yurt owned by Salt Lake County Mayor Jenny Wilsons father/prior Mayor Ted Wilson and his friend, now deceased, renowned environmentalist Rick Reese. The Wilson/Reese yurt contains a stove, beds, stacks of food, and an unlocked door, welcoming backcountry users to stay overnight and enjoy. Records show that the Wilson/Reese yurt was constructed and maintained without application and compliance with County and City ordinances and regulations. Ted Wilson is a long-time member of the Salt Lake City Public Utilities Advisory Committee. <https://www.slc.gov/boards/boards-commissions/public-utilities-advisory-committee/>; <https://www.ksl.com/article/50331943/he-left-us-a-legacy-rick-reese-a-pioneer-in-utahs-outdoors-dies-at-79>

Installing a Gate

Does the Forest Service have the authority to install the Cardiff Canyon gates, or other facilities to block or limit access to Cardiff Road? This can only be done with the concurrence of the affected landowner. *See* Exhibit 1. Also, "The US Forest Service has brought up an investigator and has installed 3 trail cams at the gate." And the US Forest Service reinforced the lock so it can't be cut off. The Forest Service has denied CCOA members keys to the gate. CCOA members are locked out of Cardiff and denied "reasonable access" to their property. CCOA does not have a copy of the Forest Services' required documentation or proof of the "concurrence of the affected landowner(s)" that is required for the Forest Service to install the Cardiff gate.

Damage to Public Lands

Who is responsible if the landowner or his/her guest cause damage to surrounding Forest Service lands as a result of their use of the access? The landowner is liable for the costs to repair the damage. *See* Exhibit 1. If harm is done to surrounding public lands, can the Forest Service take action? Yes, and the action is to "remedy" the harm. *See* Exhibit 1.

Road Maintenance

Delayed road maintenance by the Forest Service increases the chance of accidents and harm to the public and to individual private landowners and their families. One such accident recently occurred due to fallen trees. kutv.com/news/local/rescuers-say-injured-skier-with-broken-leg-was-waist-deep-in-snow-surrounded-by-trees-big-cottonwood-canyon-search-and-rescue-donut-falls-unified-fire-backcountry. Following the last several snowstorms, many fallen

trees have littered the Cardiff Canyon road. The Forest Service has not remedied this situation and the CCOA members have been prevented from taking any action to resolve this issue.

Fees - Private Landowners vs. Public Users

The fee schedule for private landowners compared to the public/backcountry users seems to lack fairness, equality, and equitable treatment. In fact, one might argue that the Forest Service punishes private landowners who pay taxes on their lands while rewarding the public, backcountry recreator. For example, one private landowner in Cardiff, with a 2 1/2 acre parcel has been charged the following: 2005 - \$109.26, 2006 - \$112.76, 2008 - \$120.80, 2009 - \$549.88, 2010 - \$747.03. This is a 683% increase from 2005 to 2010 and amounts to \$320.40 per acre, per year. Commercial uses in the Cardiff area is not allowed. However, the non-landowner, Utah Mtn. Adventures are charged an annual fee of only \$105 to access thousands of acres. Apparently commercial use is allowed for a lower amount. If the Forest Service applied the same fee schedule to Utah Mtn. Adventures as they do Cardiff landowners, Utah Mtn. Adventures would be required to pay nearly \$1 million, every year, for its permit. Although the CCOA has previously requested copies of other special use permits held by non-landowners for the Cardiff area, the Forest Service has not provided them. One might assume other backcountry users' fee schedules are more in line with Utah Mtn. Adventures and NOT with the previous pricing charged Cardiff landowners.

Takings, Eminent Domain, and Triangulation

Can limiting private landowners' access by the Forest Service be considered a "takings action"? Yes, and it reduces land value and poses a suite of problems for the Forest Service. *See* Exhibit 1. Does the Forest Service, Salt Lake County, and Salt Lake City intend to pursue Takings and Eminent Domain actions against the CCOA and its members owning private property in Cardiff? <https://propertyrights.utah.gov/takings-and-eminent-domain/>. Regardless of the Forest Service, Salt Lake City Public Utilities, and Salt Lake County's "intent", one of the questions at mediation should include: Does denying Cardiff landowners "reasonable access" to their private property by governmental agencies, meet the threshold of "taken or damaged for public use without just compensation"? Utah Constitution.

Governmental agencies have facilitated and perpetuated the following:

- (1) denied Cardiff owners "reasonable access" to their private property, and
- (2) exercised selective enforcement regarding land use, while
- (3) facilitating backcountry users who do not own land nor pay taxes on land in Cardiff, yet who have full enjoyment of private property in Cardiff, an area larger than an entire ski resort, and
- (4) possibly acting in such a manner to destroy private landowners' quiet enjoyment of their property and real land values. Governmental agencies seem to be attempting to accomplish these results while mocking the Utah Constitution

County Mayor Wilson and one of her Deputy Mayor's, Catherine Kanter, specifically instructed planning staff that they will have no communication with Cardiff owners, but that Mayor

Wilson's office and the County District Attorney's office will direct communication and actions with and against the Cardiff landowners. Of course, it is Mayor Wilson's office, using the DA's office, who has ticketed Cardiff owners for doing the same or less than what Mayor Wilson's own father has done in Cardiff, year after year with his own yurt.

Do Cardiff lands qualify as "watershed" lands? Yes. Salt Lake City owns land in Cardiff, and according to Salt Lake City Public Utilities, "...these beautiful and majestic mountains...produce naturally pure water and provide more than half of the drinking water that 360,000 people depend on every day." <https://www.slcc.gov/utilities/watershed/watershedmanagementplan/>

How much of Cardiff Fork Canyon is owned by the Forest Service? Approximately half. The other roughly half of the canyon is owned by private landowners.

Is public money available to purchase Cardiff lands if the private landowners pursue a takings claim? Yes, it appears to be. It is understood that Salt Lake City Public Utilities has nearly \$11 million in its "Public Utilities Watershed and Water Rights Purchase Fund" specifically earmarked for purchasing key "watershed" lands. <http://www.slccdocs.com/utilities/PDF%20Files/slcwatershedmgtplan.pdf>

Who built and maintained the existing Cardiff Fork Road? Private landowners in 1866 some 38 years before the Forest Service was created.

Does the Forest Service have to get permission from the landowners to cross their land and gate the road? Yes. In fact, as recently as October 2022, the Forest Service has been seeking permission from landowners to cross their land.

It is unclear on what date and by what document the Forest Service relies on for listing the private Cardiff Fork road as Forest Road #019?

Prior and Current Citations

One of CCOA's members, Cyle Buxton has had dozens of citations from the Forest Service and dozens have been dismissed. Another landowner in the Cardiff area, Mr. Dumus was cited, yet the Forest Service Ranger later showed up on his porch, instructing him to tear up the citation *See Exhibit 3*.

Has the Forest Service interfered with local law enforcement when it comes to monitoring Cardiff? Selective Actions....allowing landowners who are not on the list to access their property. Emails show that non-listed landowners were allowed to access while preventing listed landowners.

CONCLUSION

As is shown above, there are many issues that need to be resolved at the mediation between the various parties. CCOA will have representatives with authority to resolve the matter. Please contact me with any questions.

ROBERTSON ALGER & SPJUTE



Robert T. Spjute, Esq.
Attorney for CCOA